STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 1, 2014
v	No. 312409 Wayne Circuit Court
JIMMY EARL MCCASKILL, Defendant-Appellant.	LC No. 11-008725-FC

Before: METER, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of armed robbery, MCL 750.529, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 20 to 40 years for the armed robbery conviction and 3 to 5 years for the felon-in-possession conviction. He was also sentenced to a consecutive term of two years in prison for the felony-firearm conviction. We reverse and remand for further proceedings consistent with this opinion.

Defendant argues that the province of the jury was invaded when a police officer testified that defendant was the person depicted in still photographs that had been created for the police from a surveillance video. Defendant preserved this issue for appellate review by objecting on these grounds in the trial court. See MRE 103(a)(1); *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

In *People v Fomby*, 300 Mich App 46, 49-52; 831 NW2d 887 (2013), we held that it was appropriate for a police officer to testify that the individuals depicted in still photographs that he had created from a surveillance video were the same individuals depicted in the video. However, we expressly distinguished that situation from one wherein a police officer *identifies* the individuals depicted in the video or still photographs, which is not permissible. *Id.* at 52; see also *United States v LaPierre*, 998 F2d 1460, 1465 (CA 9, 1993). This distinction is consistent with the well-established rule that a witness cannot express an opinion on the defendant's guilt. See *People v Heft*, 299 Mich App 69, 81; 829 NW2d 266 (2012); *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985).

In *Fomby*, the police officer, himself, had captured the still photographs from the surveillance video footage. Thus, the officer's testimony assisted the jury in understanding the relationship between the video and the still photographs. *Fomby*, 300 Mich App at 52-53.

However, as we made clear in *Fomby*, it remains the law that a witness may not identify an individual depicted in a photograph or video when that witness is in no better position to identify the individual than is the jury. *Id*.; see also *United States v Rodriguez-Adorno*, 695 F3d 32, 40 (CA 1, 2012). Under MRE 701, a lay witness's testimony is limited to opinions and inferences that are rationally based on the witness's perception and "helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." A witness cannot provide his opinion on a matter when the jury is equally capable of reaching its own conclusion on that same issue because this invades the province of the jury. *People v Drossart*, 99 Mich App 66, 79-80; 297 NW2d 863 (1980). In the present case, the officer was in no better position than the jury to determine whether the man in the photographs was defendant. Accordingly, the officer's testimony invaded the province of the jury. *Id*. We conclude that the trial court erred by allowing the police office to testify that the man depicted in the photographs was defendant. See. *id*. at 80-82.

We also conclude that this preserved error was not harmless beyond a reasonable doubt. See *People v Lukity*, 460 Mich 484, 497; 596 NW2d 607 (1999). Defense counsel attacked the accuracy of the witness identifications. Counsel's efforts to undermine the identifications of defendant were clearly part of the defense's strategy throughout trial. The police officer's opinion testimony bolstered the other witnesses' credibility in this particular case. The error was not harmless; therefore, reversal for a new trial is required.

Defendant raises several other issues on appeal, including the admissibility of other acts evidence under MRE 404(b). Other acts evidence is admissible when it is offered to show something other than character or propensity, MRE 404(b)(1), it is relevant, MRE 402, and its probative value is not substantially outweighed by unfair prejudice, MRE 403. See *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). To be admitted as evidence of a common scheme, the acts must have common features beyond the commission of the same crime, sufficient to establish the existence of a common plan, although the plan need not be distinctive or unusual. *People v Sabin*, 463 Mich 43, 65-66; 614 NW2d 888 (2000). In the instant case, the prosecution sufficiently described the similarities between the acts to establish that they were part of a common scheme and, therefore, admissible under MRE 404(b). Further, the probative value was not substantially outweighed by the risk of unfair prejudice. MRE 403. Nevertheless, because we are reversing and remanding for a new trial, we decline to address this issue further.

We need not address the nonsubstantive error contained in the presentence investigation report regarding the date of the offense. We also decline to address defendant's argument that the jury erred by finding him guilty of felon-in-possession when the jurors were never informed that the parties had stipulated to his prior felony conviction.

Lastly, defendant challenges the trial judge's scoring of the sentencing variables under the United States Supreme Court's recent decision in *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). Because we are reversing and remanding for a new trial, we need not address this issue in this opinion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder